

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOMIAH WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

September 16, 2014

No. 316428

Wayne Circuit Court

LC No. 12-006201-FC

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Jomiah Washington, appeals by right his jury convictions of first-degree murder, MCL 750.316, assault of a pregnant individual intentionally causing miscarriage, stillbirth, or death, MCL 750.90b(a), mutilation of a dead body, MCL 750.160, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Washington to serve life in prison without parole for the first-degree murder conviction, 8 to 15 years in prison for the assault of a pregnant individual intentionally causing miscarriage, stillbirth, or death conviction, time served for the mutilation of a dead body conviction, and 2 years in prison for the felony-firearm conviction. Because we conclude there were no errors warranting relief, we affirm.

Washington argues that the trial court should have excluded references to Amanda Baer's investigative subpoena testimony when it read Baer's preliminary examination testimony into evidence at trial under MRE 804(b)(1). "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). At trial, Washington's lawyer objected to the admission of Baer's preliminary examination testimony. After the trial court ruled that the testimony was admissible under MRE 804(b)(1), and before Baer's preliminary examination testimony was read into evidence, the parties and the trial court discussed possible inadmissible portions of the preliminary examination transcript. Washington's lawyer did not object to the preliminary examination testimony in which the prosecutor impeached Baer with her investigative subpoena testimony. On appeal, Washington argues that the trial court should have excluded references to Baer's investigative subpoena testimony. Given that Washington has asserted a different ground for objection on appeal than he did at trial, the issue is unpreserved for appellate review. *Id.*

This Court reviews unpreserved evidentiary issues for plain error affecting the defendant's substantial rights. *People v Walker (On Remand)*, 273 Mich App 56, 66; 728 NW2d 902 (2006). To avoid forfeiture under the plain error rule, three requirements must be met: error must have occurred, the error was clear or obvious, and the error affected the defendant's substantial rights. *Id.* The third requirement generally requires a showing that the error affected the outcome of the lower court proceedings. *Id.*

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless it comes within an exception to the hearsay rule. *People v Dendel*, 289 Mich App 445, 452; 797 NW2d 645 (2010). MRE 804(b)(1) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The trial court found, and Washington does not dispute, that Baer was unavailable as a witness for purposes of the former testimony exception because she invoked her Fifth Amendment privilege against self-incrimination. See *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). By the time of the preliminary examination, Baer had become uncooperative and it was necessary for the prosecution to impeach Baer using her prior testimony at the investigative hearing. Baer's investigative subpoena testimony was given under oath and she was subject to cross-examination at the preliminary examination. Moreover, Washington's lawyer plainly understood the importance of Baer's testimony from the prior hearing and had the opportunity to clarify the nature of any discrepancies between Baer's testimony at the investigative hearing and her testimony at the preliminary examination. Indeed, Washington's lawyer got Baer to testify that she lied at the investigative hearing because officers threatened to take her children if she did not implicate Washington. He also got her to testify that she told the officers the truth prior to that hearing. Thus, it is evident from a fair reading of the preliminary examination that Washington's lawyer had an opportunity and similar motivation to develop Baer's testimony at the preliminary examination. *Id.* at 66-67. Therefore, the references to Baer's investigative subpoena testimony, which were used to impeach her at the preliminary examination, were admissible at the preliminary examination and later at trial. MRE 801(d)(1)(A); MRE 804(b)(1). Consequently, on this record, we cannot agree that the trial court plainly erred when it failed to sua sponte exclude the references within Baer's preliminary examination testimony to her testimony from the investigative hearing.

Washington's alternative argument that the trial court should have admitted the entire transcript of Baer's investigative subpoena testimony is misguided. The trial court properly concluded that Baer's investigative subpoena testimony transcript was inadmissible at trial because Washington's interests were not represented at the investigative subpoena hearing. Therefore, admitting the transcript of Baer's investigative subpoena testimony would have introduced inadmissible hearsay not within an exception. *Dendel*, 289 Mich App at 452.

Washington also argues his trial lawyer was ineffective. Where there has been no evidentiary hearing, as here, this Court reviews a claim of ineffective assistance of counsel for errors apparent on the record. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). “To establish a claim of ineffective assistance of counsel, the defendant must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012) (quotation marks and citation omitted), lv den in relevant part by 493 Mich 864.

Washington claims that his trial lawyer was ineffective for failing to obtain copies of the interviews by police officers with Baer so that he could properly cross-examine her at the preliminary examination. However, Washington’s citation to the record in his brief on appeal does not support his assertion that his lawyer failed to obtain copies of the interviews. Washington has the burden to establish the factual predicate for his ineffective assistance of counsel claim and may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Washington has not shown that his trial lawyer engaged in an act or omission that fell below an objective standard of reasonableness under prevailing professional norms.

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly